BRIEF IN SUPPORT OF PETITION.

I.

The court below did not properly construe Section 351 of the Revenue Act of 1936.

In affirming the decision of the Board of Tax Appeals, the court below construed Section 351 of the Revenue Act of 1936 *literally* and not in accordance with the intent and purpose for which Congress enacted that section of the Act. In effect the Circuit Court held that the words "any corporation" include *every* corporation regardless of the country of its incorporation, the country in which it was domiciled and of which it was a citizen and regardless of the fact that it transacts no business within the United States. It also necessarily held that "not more than five individuals" mean *any* five individuals who own stock in the corporation regardless of the fact that all of such individuals were non-resident aliens who transacted no business in the United States, had no office or place of business therein and were not subject to taxation by the United States. The effect of that decision is that petitioner is liable for the surtax if it does distribute its dividends; it is liable for the surtax if it does not distribute its dividends, and it has brought about an absurd, unreasonable and unjust result. That decision applied rules of statutory construction in direct conflict with the decisions made by this Court for more than one hundred and twenty-five years.

United States vs. *Palmer,* 3 Wheat. 610;
United States vs. *Kirby,* 7 Wall. 482;
Church of the Holy Trinity vs. *United States,* 143 U. S. 457;

Lau Ow Beu vs. *United States,* 144 U. S. 47;
American Banana Company vs. *United Fruit Company,* 213 U. S. 347;
United States vs. *American Trucking Association,* 310 U. S. 534.

II.

The Commissioner of Internal Revenue has no jurisdiction to levy a surtax against the petitioner herein under the Revenue Act of 1936.

The decree of the court below, in substance and effect, authorizes and empowers the Commissioner of Internal Revenue to interfere in the internal affairs of a corporation incorporated and domiciled in Switzerland, which corporation transacts no business within the United States, has no office or place of business therein, all of whose stockholders are non-resident aliens transacting no business in the United States and having no office or place of business therein. In effect that decision gives extraterritorial jurisdiction to a statute of the United States, and the decree of the court below is in conflict with the following decisions of this Court:

The Apollon, 9 Wheat. 362;
The Antelope, 10 Wheat. 66;
Hilton vs. *Guyot,* 159 U. S. 113;
Second Russian Insurance Co. vs. *Miller,* 268 U. S. 552;
United States vs. *Bank of New York & Trust Company,* 296 U. S. 463;
United States vs. *Curtiss-Wright Corporation,* 299 U. S. 304, 318;
United States vs. *Belmont,* 301 U. S. 324.

III.

The assessment of the surtax against the petitioner contravenes the provisions of the existing treaty between the Republic of Switzerland and the United States.

Since 1855 the Treaty of Commerce and Friendship between Switzerland and the United States (United States Statutes at Large, vol. 11 p. 587, vol. 18 part 2 p. 748) has been in full force and effect and, in substance, provides that citizens of both countries can manage their affairs, buy, sell and deal in every kind of property in person or by agents; that no greater tax shall be exacted from the citizens of one of the two countries than shall be levied upon the citizens of the other.

Article I provides in part as follows:

> "The citizens of the United States and the citizens of Switzerland, * * * shall be at liberty to come, go, * * * to acquire, possess and alienate therein property, to manage their affairs, * * * to consign their products and their merchandise, and to sell them by wholesale or retail, either by themselves or by such brokers or other agents as they may think proper * * *. No pecuniary or other more burdensome condition shall be imposed upon their residence or establishment, or upon the enjoyment of the above mentioned rights, than shall be imposed upon the citizens of the country where they reside, nor any condition whatever to which the latter shall not be subject."

Article II provides in part as follows:

> "No higher impost, under whatever name, shall be exacted from the citizens of one of the two coun-

> tries, residing or established in the other, than shall be levied upon citizens of the country in which they reside, nor any contribution whatsoever to which the latter shall not be liable."

The petitioner cannot escape the assessment of the surtax imposed by Section 351 of the Act. Under the provisions of Section 119 (a)(2)(B) of the Act (Pet., p. 4) petitioner's 1936 income would not be considered or treated as income from sources within the United States and, accordingly, its stockholders would in no event be taxable thereon. Other corporations, whose stockholders would be subject to either normal or surtax or both, could escape the surtax imposed by Section 351 of the Act entirely by distributing their surplus earnings to their stockholders. It is self-evident that a statute which permits one corporation to escape a tax *in toto* and denies that escape to another discriminates against the latter.

In sustaining the surtax levied against petitioner, the decree of the court below contravenes the treaty between Switzerland and the United States and is in conflict with many decisions of this Court. This Court has repeatedly held that statutes should be so construed as to harmonize with existing treaties rather than to abrogate or violate their provisions and that the obligations of such treaties should be liberally construed.

> *Asakura* vs. *City of Seattle, et al.*, 265 U. S. 332;
> *Cheung Sum Shee* vs. *Nagle*, 268 U. S. 336;
> *Jordan* vs. *Tashiro*, 278 U. S. 123;
> *Nielson, Adm.* vs. *Johnson*, 279 U. S. 47.

IV.

The court below erred in overlooking the express provisions of the Revenue Act of 1936 and the articles of the Regulations for its enforcement although they were called to the court's attention in petitioner's brief.

In petitioner's brief and on the argument before the court below petitioner clearly pointed out and stressed the importance of the provisions of Sections 119 (a)(2)(B) and 27(h) of the Revenue Act of 1936. Those provisions clearly show that petitioner's stockholders would in no event and under no circumstances be taxable on any earnings distributed to them by petitioner, and that petitioner would, therefore, be entitled to no dividend paid credit for any dividend paid by it for 1936 whether it did or did not distribute its surplus earnings. Petitioner also pointed out to the court below that, in addition to Section 119 (a)(2)(B) of the Act, Article 143-1 of the administrative Regulations* also clearly provided petitioner's stockholders would not be subject to any tax upon dividends received from petitioner. By Section 27(h) of the Act (Pet., p. 4) petitioner would be entitled to no dividend paid credit upon the amount of any dividend paid by it for 1936 as no part of such dividend would be taxable in the hands of the petitioner's stockholders.

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* Article 143-1 of the Regulations provided for a withholding tax on income paid to nonresident alien individuals except "(1) * * * (2) * * * (3) dividends paid by a foreign corporation unless (A) such corporation is engaged in trade or business within the United States or has an office or place of business therein and (B) more than 85 percent of the gross income of such corporation for the three-year period ending with the close of its taxable year preceding the declaration * * * was derived from sources within the United States * * *."

Article 102-1 of the Regulations (Pet., p. 5) states that, even though a foreign corporation derives income from sources within the United States, if it is composed entirely of nonresident alien individuals, the tax imposed by Section 102 of the Act will not apply as such individuals would not be subject to the surtax with respect to distributions of the corporation.

Article 143-9 provides, in part as follows:

> "If the tax is paid by the recipient of the income or by the withholding agent it shall not be recollected from the other, regardless of the original liability therefor, and in such event no penalty will be asserted against either person for failure to return or pay the tax where no fraud or purpose to evade payment is involved."

No fraud or purpose to evade payment of any tax due to the United States has ever been raised in this cause by the Commissioner of Internal Revenue.

All of the foregoing sections of the Revenue Act and the Articles of the administrative Regulations were expressly called to the attention of the Circuit Court. It seems patent that the court below could not properly decide this case without considering the above mentioned provisions of the law and Regulations. In its opinion that court either disregarded or inadvertently overlooked and failed to mention any of said sections or regulations. This appears to be such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

V.

The provisions of the last sentence of Article 102-1 of the administrative Regulations of the Act apply to all foreign corporations which are composed of nonresident alien individuals who are not engaged in trade or business within the United States and who do not have an office or place of business therein.

The last sentence of Article 102-1 of the Regulations is set forth in the petition, page 5. That Regulation, in express words, provides that nonresident alien individual corporate stockholders who are not engaged in trade or business within the United States and do not have an office or place of business therein, are not subject to the surtax with respect to distributions of the corporation. The Commissioner of Internal Revenue has contended that that Regulation applies only to corporations subject to taxation under Section 102, *i.e.*, corporations improperly accumulating surplus, and that it does not apply to petitioner or petitioner's stockholders although the latter are all nonresident alien individuals who are not engaged in trade or business in the United States and who have no office or place of business therein. The legal effect of the administrative Regulations made for the enforcement of the Revenue Acts are questions for decision by the Federal Courts and not by the Commissioner of Internal Revenue.

Morrill vs. *Jones*, 106 U. S. 466;
United States vs. *George*, 228 U. S. 14.

Whether petitioner's stockholders and nonresident alien stockholders of other foreign corporations, situated as petitioner is situated, are included within the last sentence

of Article 102-1 of the Regulations is a question of importance in the administration of the revenue laws which has never been passed upon by this Court.

VI.

The Commissioner of Internal Revenue has no power or authority to waive the provisions of Section 27(h) of the Revenue Act of 1936.

By Section 27(h) of the Act (Pet., p. 4) it is provided that, if any part of a distribution is not a taxable dividend in the hands of the shareholders, no dividend paid credit shall be allowed with respect to such part. Under the express provisions of Section 119 (a)(2)(B) (Pet., p. 4) a dividend paid by petitioner to its stockholders in 1936 would, as aforesaid, not be taxable to the latter, and it follows that petitioner would be entitled to no dividend paid credit even if it distributed its entire surplus earnings in 1936. Neither would it be entitled to such dividend paid credit if it did not distribute its earnings for that year. In his brief in the court below respondent contended that petitioner was denied a dividend paid credit because it failed to file a personal holding company return within the time required. On the oral argument he asserted that, if petitioner had filed a timely return, the Commissioner would have allowed petitioner a dividend paid credit. In making both of those statements respondent has exceeded his power and authority. Section 27(h) of the Act is specific and leaves no room for argument and gives respondent no discretionary power. *United States* vs. *United Verde Copper Co.*, 196 U. S. 207; *United States* vs. *George, supra.* Respondent was of necessity forced into this position of

waiving a Statute in order to sustain a tortured and erroneous construction of Section 351 of the Act. As the opinion of the court below is silent with respect to the application of Section 27(h), the petitioner believes that the question of the power and authority of the Commissioner of Internal Revenue to waive an express statutory provision of the Revenue Acts is of sufficient importance to warrant a review of the decision by this Court.

Petitioner, therefore, believes that not only is the decision of the Circuit Court of Appeals for the Fourth Circuit in this case a matter of substantial importance involving the Revenue laws of the United States but that it is also in conflict with decisions of this Court.

For the foregoing reasons it is respectfully requested that this Court exercise its supervisory powers and that the writ be allowed.

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